IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 283.

JAMES VICTOR SALEM,

Petitioner,

against

UNITED STATES LINES COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT.

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QUESTIONS PRESENTED

1. Stripped to its essentials, the real question before this Court as to negligence is whether a seaman may recover damages from a shipowner on the theory that its vessel was negligently constructed without proving any standards of proper naval architecture.

Stated another way, may a jury find a shipowner negligent in failing to furnish unidentified "safety devices" or railings when the shipowner, on the one hand, proves that the area in question is safe without "safety devices" and railings, and on the other hand, the seaman fails to establish by competent proof that "safety devices" and railings should have been installed.

2. May a trial court award 3 years' future maintenance where (a) there is no evidence to support the award and (b) where the court did not make findings of fact and conclusions of law as required by Rule 52 of the Federal Rules of Civil Procedure.

Statement of the Case

Most of the salient facts are set forth in the majority opinion of the court below. (199-207)* However, one very important statement, hereinafter mentioned, is inaccurate.

For reasons too obvious to need recital, petitioner has included "facts" in his brief, under "Statement of the Case", some of which are of doubtful accuracy but which, in any event, have no relation to the narrow issues involved in this appeal. These will be disregarded by respondent in conformity with Rule 40 of the Rules of this Court.

Petitioner testified that as lookout seaman he reported for duty at 12:00 midnight to his post in the crow's nest. (19, 20)

The crow's nest on the SS. *United States* is of vastly different construction from the common conception of the term as laymen know it. The crow's nest on other vessels, is normally situated on the foremast well above the bridge so as to provide better visibility for the look-outs. Generally, it is a basket shaped compartment with some protection against the weather. Entry to it is usually gained through a trap door in the floor. The ladder leading to it is a straight ladder exposed to the weather. Because of its location on the vessel no light is provided.

The petitioner and his witnesses were experienced with such ladders and admitted having had to use them under inclement conditions on a rolling vessel (32, 87, 88, 218, 219).

The ladder on the SS. *United States* was purposely constructed so as to provide maximum protection and safety for members of the crew having to use it. It was located within the radar tower, a tubular hollow structure. From

* References are to the Transcript of Record.

the base of the tower to the crow's nest platform measures 31′. Inside the tower is a steel ladder leading to the crow's nest. This ladder is 15″ in width having flat 1″ x 1″ rungs spaced 12″ apart. The ladder rises from the deck to the first platform at a 74° angle. Then rising at a right angle from the first platform the ladder passes through three platforms having openings of 18″ x 30″ x 24″ before it reaches the platform on which the crow's nest is located. The distance from the deck to the first platform is 10′ 4″ while the distance between the other platforms is 5′ 2″. These platforms are composed of steel and are positioned horizontally to the main decks.

At the level of the crow's nest, the platform through which the ladder passes, at its widest point, is 46″ and at its narrowest 36″. The platform itself is 73″ fore and aft between the ladder and the crow's nest. (Pltfs Ex. 4) The crow's nest is reached by walking forward about 4′ from the ladder.

The crow's nest itself is a projection on the radar tower in which a seaman can maintain his watch and be fully protected from the elements. A swinging door to the crow's nest is kept closed in order to exclude light from shining forward. The crow's nest was equipped with a telephone which was directly connected to the bridge. By this telephone, the look-out could report objects ahead and also any trouble which might develop in the area where he worked. For example, when lights burned out, he was duty bound to report directly to the bridge (49). There was always an electrician on duty whose job it was to replace bulbs (37).

The ladder and the platform leading to the crow's nest were in frequent service. One of petitioner's witnesses testified that during the 160 voyages which he made he had occasion to use the ladder and platform over 14,000 times (216,

219, 220). The two other regular look-outs would have to utilize the ladder the same number of times. In addition three relief look-outs would use the ladder and platform 4 times each a day.

During all this use of the ladder and the platform, there had never been an accident excepting the one involving petitioner (50). Petitioner himself admitted that he had had no previous trouble using the ladder and the platform (31). Incidentally, it was conceded that the ladder itself was in no wise defective (30).

On the night of the petitioner's accident, although he maintained that lights were out during his entire watch, he never reported the situation to the officers on the bridge (21) although it was his duty to do so (49).

Petitioner had served part of his watch before his accident, and was relieved by seaman Richards. On descending the ladder he observed that two of three lights in the tower were out (20). The same condition prevailed an half hour later when he ascended the ladder on his return from coffee time. He had placed one foot on the platform and as he was transferring the other, the light went out. However, he reached the platform safely.

It is at this point, where the opinion of the court below is in error with respect to petitioner's position on the platform. For the convenience of the court, there is quoted in the margin the testimony given by petitioner in respect of this.[1]

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[1] (27) Q. I am talking now about the time of your accident. Do you understand that? A. Yes.

Q. I say that after the light went out, you had your both feet on the platform. A. That's correct.

Q. At that time were you facing towards the doorway to the crow's nest? A. It wasn't exactly facing the door. Just like I told

This testimony shows that petitioner reached the middle of the platform safely and was stepping forward when in some way, not explained in the testimony, he lost his balance and fell. He had but to take one more step to reach the doorway leading to the crow's nest. His fall was not due to the darkness. He did not step into the access hole. He was not holding on to anything at the time, although if he had stretched out his arms, he could conveniently take hold of the sides of the radar tower, which had a stiffener or shelf running around it at shoulder level (28-30).

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you before, I was half—what do you call this? I was half to the starboard and half to the forward, but more to the forward.

Q. At that time and before you fell, did you have your hands along your sides? A. Before I fall?

Q. Yes. A. You don't make it too clear to me.

The Court: Where were your hands when you fell?

Q. Where were your hands before you fell? A. Just like this (indicating).

Q. Hanging along your sides? (28) A. Yes.

Q. Both hands. A. Yes.

Q. You were not holding on to that radar casing? A. I already moved from it.

Q. You were not holding on to it? A. No.

Q. Then I understand the next thing you did was to take one step forward towards the crow's nest, and then that is the time that you fell? A. No. I already moved one foot before that.

Q. You already had gone one foot towards the crow's nest? A. Not to the crow's nest. To the side; to the middle.

Q. To the middle? A. Yes.

Q. Was that step that you took forward towards the crow's nest? A. That's after I take the step with the left foot, and at that time I remember I was in the middle. That's the time I slipped.

Q. In the middle of the platform? A. Yes.

Q. As you stood in that position in the middle of the platform, if you had extended your hands on each side, you could have touched each side of the area or the radar tower, could you not? A. I tried to.

Q. I say you could do it. A. I could, but I don't have the time yet to grab it.

Q. I am talking about after the lights went out. A. Yes.

Q. You had your feet on the platform. A. Yes.

In a statement given on board the ship, petitioner said he was actually stepping into the crow's nest as he fell. (Pltf's Exh. 7) He retracted this later on.

In any event, no claim is made that there was any grease or oil on the platform and from all that appears in the testimony, petitioner merely lost his balance. Whether it was due to the roll of the ship is not known, but even if it were, it would not cast the shipowner in damages. A seaman must be able to maintain his balance on a rolling ship. (32) Or as expressed by Judge Mayer in *Adams et al* v. *Bortz* 279 F. 521, 525 (C. A. 2nd, 1922), "Ships roll, and those who go to sea must have sea legs."

Moreover, petitioner was fully familiar with the area and the platform. (30, 31) He had been a lookout for almost a year and had had to use the ladder and the platform 8 times a day. Therefore, over the period of a year during which he had been look-out, petitioner had used the ladder and platform hundreds of times and could not help but be fully familiar with it and its surroundings. His familiarity should have enabled him to proceed around the platform in total darkness. On other ships as look-out, he would have to proceed in total darkness while being exposed to the elements (32).

The platform provided him on the SS *United States* was substantially safer than the access to crow's nests on other vessels. Nowhere in the trial court did petitioner challenge this fact.

The only other factual matter within the limits of the issues before this Court is the allowance of three years future maintenance. The award by the trial court was set aside because of the absence of evidence to support it.

Nowhere in his brief does petitioner point to any testimony which supports an award of three years future maintenance. Indeed, there was none, as the court below properly found. There is quoted on page 18 of this brief, the finding of the court below in this regard.

There was substantial basis for this unanimous finding by the Court of Appeals. As the record shows, there was a very serious dispute as to the nature and extent of petitioner's injuries. While petitioner's doctors said that he was permanently disabled, respondent's doctors said that petitioner was fit for duty, as did also Marine Hospital doctors. Petitioner's doctors based their opinions on petitioner's complaints that he was unable to walk without a limp and that he was unable to bend or lift. In addition to showing through its doctors that petitioner could perform all these acts, respondent produced motion pictures of the petitioner showing that he was able to walk without a limp, without the need for a cane, and could fully bend and lift. For example, the motion pictures showed petitioner striding along the street at a fast gait, bending over repairing his car and even jacking it up with a hand jack [Deft's Ex. K] (190-191).

Moreover, petitioner, in his applications for a license to drive automobiles stated that he did not have any mental or physical disabilities (81).

Summary of the Argument.

It should be noted at the outset that the points raised in this Court are but two of the matters argued in the Court of Appeals. The court said (207) it believed "it unnecessary to discuss the many other errors complained of" because of its conclusion that a new trial was necessary in

any event. Judge Waterman said (211) "An examination of the whole record convinces me that the full retrial ordered by the panel majority is desirable".

"[T]he many other errors" (207) will not be set out. Sufficient to say that respondent maintains throughout that it did not have a fair and impartial trial.

Accordingly, either the order for a new trial must be affirmed or the case must be remanded to the Court of Appeals for consideration of the numerous other errors.

This situation alone points up the lack of importance of the bare two questions now raised. They really concern only questions of sufficiency of evidence.

Respondent asserts that in a Jones Act (46 USC 688) case, a seaman must prove negligence to support a recovery for damages and that that negligence must be shown to have been the proximate cause of his injury.

Respondent showed that the area in question had proven safe over a period of eight and one half years. Petitioner talked about hand rails but never showed that their absence caused his accident. The trial court in its charge added the term "safety devices" (114-123) without defining them, but even as to these (whatever they are supposed to be) their absence was not shown to have been a proximate cause of the accident.

Petitioner admitted that he made no effort to support himself by his hands. He kept his hands at his sides when he could easily have maintained his balance by extending his arms, and taking hold of the sides of the enclosure. (See petitioner's testimony set forth in the margin on pages 4-5 of this brief.)

Petitioner's contention that there was a "fairly obvious danger" is without merit. The so-called danger relates to the access hole leading to the crow's nest platform. The hole could not be covered and at the same time permit one

to pass through the platform. Moreover, petitioner was away from the hole at the time of his accident. By his own admission he had taken at least one step away from the hole. Thus this is not a case of a person stepping into a hole because of inability to see. Petitioner says he fell into the hole because he lost his balance to which should be added that he could have saved himself if he had taken the precaution to hold on to appliances readily at hand.

It is respectfully submitted that before a shipowner is cast in damages in a Jones Act (46 USC 688) case, the seaman must do more than merely mention appliances and contend that their absence caused an accident. He should be required to submit solid proof of the shipowner's failure to comply with proper standards of safe construction by persons competent to give positive evidence.

The award of three years future maintenance violated the rule established by this Court in *Calmar Steamship Corp.* v. *Taylor* (303 U. S. 525), that a seaman's recovery must be limited to "such amounts as may be needed in the immediate future • • • for a period which can be definitely ascertained".

There was no evidence within these limits and no findings made that there was, and the award contravened Rule 52 of the Rules of Civil Procedure.

POINT I.

IT IS RESPECTFULLY CONTENDED THAT THIS IS NOT A CASE WARRANTING THIS COURT'S CONSIDERATION BOTH FROM THE POINT OF VIEW OF THE LACK OF IMPORTANCE OF THE QUESTIONS RAISED AND BECAUSE THEY MERELY BRING UP FOR REVIEW THE QUESTON OF SUFFICIENCY OF THE EVIDENCE AND WITNESS CREDIBILITY.

It can be seen from the foregoing recital of facts that the questions before this Court are indeed not of national importance and their determination concerns only the parties here involved. Moreover, the questions raised concern only sufficiency of evidence.

Even though certiorari was granted, this Court may still hold that the grant was improvident and dismiss the petition. *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U. S. 387, 393; *McAllister* v. *United States*, 348 U. S. 19, 24; Rule 19 of the Rules of this Court.

POINT II.

IF IN A JONES ACT (46 USC 688) CASE, A SEAMAN RELIES ON NEGLIGENT SHIP CONSTRUCTION AS HIS BASIS FOR RECOVERY, HE MUST PRODUCE COMPETENT PROOF THEREOF BY QUALIFIED WITNESSES. A JURY MAY NOT MAKE A FINDING OF NEGLIGENT SHIP CONSTRUCTION ON MERE MENTION OF RAILINGS OR UNSPECIFIED APPLIANCES. NOR MAY HE HAVE RECOVERY WITHOUT PROOF THAT THE NEGLIGENT CONSTRUCTION WAS THE PROXIMATE CAUSE OF HIS ACCIDENT.

Petitioner's argument in this Court is based on the allegation that the crow's nest platform was negligently constructed and that a jury could determine this claim

without evidence by qualified persons. He argues that a jury of laymen could make a determination without the aid of experts. In this connection, this Court should bear in mind that petitioner vigorously objected to the introduction in evidence of an exact size model of the crow's nest, which would have helped the jury in reaching a conclusion. The one solid piece of evidence which would have aided laymen was the model which petitioner was successful in having excluded from the jury's view.

Had the model been examined by the jury, it would readily have seen the ease with which petitioner might have maintained his balance and avoided falling. The jury could have seen also that "railings or other safety devices" were unnecessary and that their absence did not constitute negligent construction.

The respondent proved that the area was safe, there having been no accidents (other than that which the petitioner claimed) for a period of over eight and a half years although the area had been in use on thousands of occasions by the lookouts.

> "The fact that premises or appliances have been used for many years by many persons, without injury, or that no evidence was produced that any other person than the plaintiff had been injured, is a strong circumstance in disproof of negligence in the use of such premises or appliances." 1 *Shearman and Redfield on Negligence*, Section 59, at 168, Revised Edition (1941).

See also *Hubbell* v. *City of Yonkers*, 104 N. Y. 434, 10 N. E. 858; *DiSalvo* v. *Stanley-Mark Strand Corp.*, 281 N. Y. 333; *Levinowitz* v. *Cunard White Star*, 129 F. Supp. 555 (S. D. N. Y. 1955); *Martucci* v. *Brooklyn Children's Aid Soc.*, 140 F. 2d 732 (2 Cir. 1944). See also the annotations of various state court decisions in 31 A. L. R. 2nd 190.

The Court of Appeals ordered a new trial with respect to the negligence count because of error in the charge to the jury. The trial court ordered the jury to award petitioner damages "if you find the defendant was negligent in failing to provide railings or other safety devices". The Court of Appeals correctly found that there was no evidence of any kind in the record to support this charge. It was not shown that railings could feasibly be constructed or should have been installed, or for that matter that failure to provide such railings constituted negligence or made the ship unseaworthy. Nor was there any proof that railings could have prevented the accident. On the contrary, the proof showed that petitioner made no effort to support himself by use of his hands. He could have done this merely by extending his arms to the sides of the tower where he could have held on to a ledge projecting at about the level of his shoulder. Moreover, there were other objects within reach which he could have grasped. This petitioner failed to do. Petitioner admitted that at the time of his accident his hands were at his side so, hypothetically, even if there were additional handholds to which petitioner could have grasped for support, the fact of the matter is he did not attempt to grasp anything.

Petitioner did not even maintain on the trial that there should have been "other safety devices". This was one of the prejudicial matters that the the trial court inserted in the absence of any claim or proof thereof. Moreover, there was never even a suggestion as to what the "safety devices" should be.

Actually, petitioner's claim as to railings and "other safety devices" should have been dismissed for failure of proof; allowing petitioner a second chance to make this proof is more than he deserves.

The opinion of the Court of Appeals states: (202)

> "Plaintiff and a seaman, Richards, testified that there was no railing inside the tower at the crow's nest level of the tower. However, there was testimony that there was a radar enclosure or casing which plaintiff could hold to, and did grasp with his left hand, as he stepped onto the platform. Plaintiff also testified that there was a shelf or stiffener encircling the inside of the tower about shoulder high as plaintiff stood on the platform. The tower enclosure varied from 36 to 48 inches in width so that plaintiff could have reached each side of the wall of the tower from the platform by raising his arms. There was no expert testimony that proper marine achitecture required the additional provision of railings or other safety devices on such a ladder or platform enclosed within a tower leading to a crow's nest."

After posing the question to itself whether or not, under the above conditions, the jury should have been permitted to decide whether proper marine architecture required railings or other safety devices, the court below found it was error to submit this question to the jury without expert testimony. All of the reported cases say that to find liability there must be some proof of negligence. Petitioner's claim concerned ship construction and a lay jury could not determine what was or was not proper construction without some evidence to guide it. Petitioner offered none. Respondent proved that the area had always been safe.

Having found prejudicial error in the charge to the jury, the court employed the language used in *Fatovic* v. *Nederlandsch-Amerikaansche Stoomvaart, Maatschappij* (2 Cir. 1960), 275 F. 2d 188, 189:

> "Since we cannot determine from the general verdict brought in by the jury whether they relied upon a proper or improper claim of unseaworthiness in reaching their decision, we must reverse the judgment and order a new trial."

See also *Rosenquist* v. *Isthmian Steamship Company*, 205 F. 2d 486 (C. A. 2nd 1953); *United N. Y. & N. J. Pilots* v. *Halecki, Admx.*, 358 U. S. 613, 619.

Petitioner's claim of "fairly obvious danger" is likewise without merit. The alleged "danger", the manhole in the platform, through which the ladder passed, is necessary to admit one to the platform. As the testimony showed, the crow's nest ladder on the SS. *United States* is safer than on other vessels where the crow's nest ladders are exposed to the elements and require seamen to ascend a straight ladder some forty feet. In contrast, the ladder on the SS. *United States* is within the tower and has 3 or 4 platforms on which a seaman can rest on his way to the crow's nest.

The opening in the crow's nest platform is only 18" by about 24" to 30". Petitioner had safely negotiated this opening and had taken a step away from the opening when his accident occurred. (28). Had petitioner taken one more step he would have been at the door leading into the crow's nest. Thus, he was safely on the platform away from the opening and away from the "obvious danger". The access hole in the platform did not cause his accident. Having served as a lookout on the SS. *United States* for approximately 1½ years before his accident, petitioner had climbed the ladder and crossed to the crow's nest on hundreds of occasions without incident. In point of fact, since the SS. *United States* was constructed in 1952, there has been but one accident, petitioner's, on the crow's nest platform. It is well established that respondent could not be held negligent in

constructing or maintaining the crow's nest platform on its vessel when respondent was unaware of any defective or dangerous condition existing therein. There had never been any accidents in this area. Certainly, this area could not be considered one of "fairly obvious danger".

Matters in relation to nautical architecture require expert testimony. *Anton Fatovic* v. *Nederlandsch-Amerikaansche Stoomvaart, Maatschappij*, 275 F. 2d 188 (C. A. 1960) where the court said at page 190:

> • • •"In any event, the question was one of nautical architecture about which jurors lack the knowledge to form an intelligent judgment in the absence of expert testimony, *Martin* v. *United Fruit Co.*, 2 Cir. 272 F. 2d 347. Since there was no expert testimony on the matter, it should not have been submitted to the jury." • • •

and again at page 189:

> "The dispositive question on appeal is whether the trial judge erred in charging the jury that the existence of certain conditions would have rendered the ship unseaworthy. We conclude that, as to at least two of the five conditions, there was no evidence from which the jury could have found that their existence made the ship unseaworthy. It was therefore error to submit the case to the jury on these claims, and we must reverse the judgment and order a new trial."

Respondent's brief (pp. 11-14) in opposition to certiorari distinguished the cases emphasized by petitioner. Petitioner's current brief includes additional cases which are distinguished now. These new citations do not support his claims.

Bader v. *United Orthodox Synagogue*, 148 Conn. 449. 172 A. 2d 192 (1961). Plaintiffs fell from the back porch

of a residential building used as a meeting place. The door leading from the house made it necessary for persons leaving to walk close to the edge of the porch which had no railing. While attempting to leave the building across the unlighted porch they fell therefrom. The court held merely that a jury could find that such construction was negligent. This fact situation has no relationship whatever to the case at bar. In *Bader* the plaintiffs had never been on the porch whereas petitioner had been in the crow's nest structure hundreds of times. He was fully familiar with the area, in which there were means for support.

Pure Oil Company v. *Snipes*, 293 F. 2d 60 (5 Cir. 1961) (petitioner's brief p. 31). Snipes was a member of an oil drilling crew who fell from an oil drilling platform located 65 miles offshore. Snipes was thrown from the curved top of a water tank when a pipe broke. He passed through a hole in the drilling platform left by removed gratings. The tank itself was part of the permanent equipment of the platform. The top of it presented a curved surface about 15 feet above the deck of the platform. There were no hand rails or safety lines around the edge of the tank top although the tank was equipped with a permanent welded ladder evidencing defendant's knowledge that persons would be required to work on the tank top.

The physical surroundings in the Snipes case are in no way comparable to those in the case at bar. In Snipes the floor was curved with no place for one to take hold or maintain his balance. In the case at bar the footing was flat and the area was confined so that one could maintain his balance by merely extending his arms. In any event, the language quoted in the petitioner's brief is *dicta*, the decision turning on a different point.

In *The Leontios Teryazos*, 45 F. Supp. 618, 622, the court sitting in admiralty held that libelant's negligence was the sole cause of his accident which occurred when he fell into an open hatch. In a finding limited to the precise facts of the case the court held that the hatch should have had some protective measures such as covers, rails, stanchions or guard chains. However, recovery was denied because libelant failed to offer any proof that such devices were not available on the vessel and libelant's lack of candor in testifying, not the absence of appliances, caused the court to conclude that libelant's negligence was the sole cause of his accident.

Finally, the shipowner's duty is well defined in *Mitchell* v. *Trawler Racer Inc.*, 362 U. S. 539, where Justice Stewart stated at page 550:

> "What has been said is not to suggest that the owner is obligated to furnish an accident-free ship. The duty is absolute, but it is a duty to furnish a vessel and appurtenances reasonably fit for their intended use. The standard is not perfection, but reasonable fitness; not a ship that will weather every conceivable storm or withstand every imaginable peril of the sea, but a vessel reasonably suitable for her intended service. Boudoin *v.* Lykes Bros. S. S. Co., 348 U. S. 336."

POINT III.

A.

THE UNANIMOUS REVERSAL OF THE AWARD OF 3 YEARS' FUTURE MAINTENANCE WAS CORRECT BECAUSE THE AWARD WAS NOT SUPPORTED BY ANY EVIDENCE.

B.

THE TRIAL COURT ERRONEOUSLY FAILED TO MAKE ANY FINDINGS TO SUPPORT ITS AWARD AS REQUIRED BY RULE 52 OF THE FEDERAL RULES OF CIVIL PROCEDURE AND THE AWARD WAS REVERSIBLE ON THIS GROUND ALONE.

C.

PETITIONER WAS NOT ENTITLED TO FUTURE MAINTENANCE BECAUSE HE HAD FAILED TO TAKE THE RECOMMENDED REHABILITATION TREATMENTS.

A.

The court below after examination of the record found that there was no evidence to support an award of future maintenance. It said (204):

> "The only evidence pertaining to a period of future maintenance, or the duration thereof, is the testimony of two doctors. Dr. Granbard testified to the effect that, at the time of the trial, plaintiff was still disabled and not capable of any work as a seaman. Dr. Kaplan testified to the effect that the likelihood of improvement was remote, and that it may be that plaintiff would get worse and require more specific therapy. There was no evidence that plaintiff

> required three years future treatment. Plaintiff's doctors did not testify as to probable duration of future treatment, if any. We do not think there was sufficient evidence upon which to base a finding of a three year future maintenance period."

After discussing *Calmar Steamship Corp.* v. *Taylor*, 303 U. S. 525, the court made reference to *Farrell* v. *United States*, 336 U. S. 511, wherein it was held that maintenance and cure payments would be required only until such time as the seaman was cured or was found to be incurable. Relating this language to the facts in the case at bar, the court stated: (205)

> "The extreme uncertainty surrounding either or both of these possibilities would appear to make any award for future maintenance improper in this case. For instance, in the instant case, there is, in addition to the possibility of plaintiff's full recovery from his back injuries, the further possibility that his not-so-latent psychotic condition might get the better of him at any time. If he became permanently insane, even if that condition were reliably linked to the accident, his maintenance payments would cease."

The court below concluded: (205)

> "There does not appear to be any sufficient basis, by opinion evidence or otherwise, for the finding that three years is the period reasonably to be expected for Salem to reach maximum improvement."

Petitioner does not even attempt to support the award by the trial court with any reference to the facts adduced on the trial and, actually, no facts exist in the record to support the award. Petitioner does not challenge the conclusion made by the court below and quoted above. The situation then is that the trial court made an award with-

out any basis in fact and the Court of Appeals reversed it on findings that there was no evidence to support the award.

Petitioner's attack on the unanimous opinion of the court below in reversing the award for future maintenance is based on a misconception of what this Court held in the two classic cases of *Calmar Steamship Corp.* v. *Taylor*, 303 U. S. 525; and *Farrell* v. *U. S.*, 336 U. S. 511.

In *Calmar Steamship Corp.* v. *Taylor*, this Court was faced with the question of whether the award of maintenance for 7 years in the future was erroneous. Holding that it was, this Court said in *Calmar* (303 U. S. 525) at page 530:

> "The award of a lump sum in anticipation of the continuing need of maintenance and cure for life or an indefinite period, is without support in judicial decision. Awards of small amounts to cover future maintenance and cure of a kind and for a period definitely ascertained or ascertainable have occasionally been made. *The Mars*, 149 Fed. 729, 730 (C. C. A.); *Wilson* v. *Manhattan Canning Co.*, 205 Fed. 996, 997 (D. C.). But the award here seems to us to be inconsistent with the measure of the duty and the purposes to be effected by its performance. The duty does not extend beyond the seaman's need. *Raymond* v. *The Ella S. Thayer*, 40 Fed. 902, 903 (D. C.); *The J. F. Card*, *supra*, 95; *The Bouker No. 2*, *supra*, 835; *The Santa Barbara*, 263 Fed. 369, 371 (C. C. A.); *Stewart* v. *United States*, 25 F. (2d) 869, 870 (D. C.); *Marshall* v. *International Mercantile Marine Co.*, 39 F. (2d) 551, 553 (C. C. A.); cf. *Holt* v. *Cummings*, 102 Pa. 212; *contra*, *Reed* v. *Canfield*, *supra*. The amount and character of medical care which will be required in the case of an affliction, as well defined even as Buerger's disease, cannot be measured by reference to mortality tables. More-

> over, courts take cognizance of the marine hospital service where seamen may be treated at minimum expense, in some cases without expense, and they limit recovery to the expense of such maintenance and cure as is not at the disposal of the seamen through recourse to that service. *The Bouker No. 2, supra*, 835; *Marshall* v. *International Mercantile Marine Co., supra*, 553, and cases cited. Furthermore, a duty imposed to safeguard the seamen from the danger of illness without succor, and to safeguard him, in case of illness, against the consequences of his improvidence, would hardly be performed by the payment of a lump sum to cover the cost of medical attendance during life.
>
> The seaman's recovery must therefore be measured in each case by the reasonable cost of that maintenance and cure to which he is entitled at the time of trial, including, in the discretion of the court, such amounts as may be needful in the immediate future for the maintenance and cure of a kind and for a period which can be definitely ascertained."

Petitioner has taken out of context part of a sentence of this Court in *Farrell* and on it has built an erroneous argument to support an untenable position.

In *Farrell* v. *U. S.*, 336 U. S. 511, the Court adopted the reasoning and the language in *Calmar* and went on to hold that even in cases where the disability was due to the seaman's service on the vessel, the shipowner's liability for maintenance was not greater than stated in *Calmar*. The suggestion on page 40 of petitioner's brief that because the petitioner's injury was service-connected his right to maintenance deserves different consideration is without legal support. The holding in the *Farrell* case is to the contrary.

McAllister v. *United States*, 348 U. S. 19 cited by petitioner is not apropos. In the *McAllister* case, the Court of Appeals reversed the fact finding by the district court although not deciding that the finding of the district court was clearly erroneous. This Court held that there was substantial evidence upon which the district court reached its conclusion and that, therefore, its decision should stand as not clearly erroneous.

The "clearly erroneous" doctrine is not applicable here for the very reason that the trial court made no findings of fact and conclusions of law thereon.

None of the other cases cited by petitioner in Point III of his brief (other than the *Calmar* and *Farrell* cases) is determinative of the question before this Court. This question is: "May an award of future maintenance be made in the absence of evidence to support it?" Petitioner's cases say that the determination of the limits of maintenance depend on the individual facts proven in each case. Respondent does not disagree with this. Here there was not even a scintilla of evidence that petitioner required three years further treatment. Neither of petitioner's doctors gave any testimony with respect to future treatment or its probable duration. On the other hand, respondent's doctors said that petitioner was fit for duty and, thus he would not be entitled to future maintenance (105, 106, 107, 92, 182).

The award of future maintenance was contrary to the policy of this Court and not supported by the evidence. The Court of Appeals correctly reversed it.

B.

Rule 52 F. R. C. P. provides in part: "In all actions tried upon the facts without a jury or with an advisory jury, the

court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; * * *"

The court below, in *Alexander* v. *Nash-Kelvinator Corporation*, 261 F. 2d 187, page 191, said:

> "* * * This court is mindful of the principle so frequently reiterated that the question of the excessiveness of a jury verdict is to be determined by the trial court on a motion for a new trial. In such cases the trial court, in effect, occupies the position of a reviewing judge. He has the power to pass upon, set aside or even reduce by remittitur excessive awards. Where a case is tried by a judge without a jury the defendant is deprived of this right. The first opportunity which an aggrieved defendant has in this respect in a non-jury trial is upon appeal. For these reasons it becomes most important that the trial court comply meticulously with the requirements of Rule 52(a) with respect to findings so that the appellate court can properly appraise the elements which entered into the award. Just as the trial judge passes upon possible passion or prejudice and all the other legal grounds for attacking excessive damages on the post-trial motion to set aside a jury verdict so on the appeal the appellate court should have some knowledge of the basis or theory upon which the trial judge acted. Without this information the defendant is unable properly to exercise the appellate rights conferred by statute and the court is equally unable to make appropriate appellate review."

All the trial court did was to erroneously state orally that there was evidence, but, of course, could not identify it.

C.

The Marine Hospital recommended that petitioner take rehabilitation treatment which he did not do (167). This

failure to submit to this treatment amounts to neglect to take the proper means to cure himself. Thus, he is barred from future maintenance. *Donovan* v. *Esso Shipping Company*, 152 F. Supp. 347 (DCNJ 1957), aff'd. 259 F. 2d 65 (3 C. A. 1958), cert. den. 359 U. S. 907.

Petitioner failed in his proof and the cause of action for future maintenance should have been dismissed. *U. S.* v. *Johnson*, 160 F. 2d 789 (9 C. A. 1947); aff'd sub nom. *Johnson* v. *U. S.*, 333 U. S. 46; *Wilson* v. *U. S.*, 229 F. 2d 277 (2 C. A. 1956); *Bailey* v. *City of New York*, 153 F. 2d 427 (2 C. A. 1946).

CONCLUSION.

IT IS RESPECTFULLY SUBMITTED THAT THE PETITION SHOULD BE DISMISSED AS HAVING BEEN IMPROVIDENTLY GRANTED OR IN THE ALTERNATIVE THAT THE JUDGMENT OF THE COURT OF APPEALS REVERSING THE JURY VERDICT FOR INSUFFICIENCY OF EVIDENCE BE AFFIRMED AND THAT THE REVERSAL OF THE AWARD FOR FUTURE MAINTENANCE BY THE TRIAL COURT BE AFFIRMED.

Respectfully submitted,

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